

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 47

Docket No. CH-0752-11-0260-I-1

**LaTonya Marie Hall,
Appellant,**

v.

**Department of Defense,
Agency.**

April 2, 2012

Gregory Harmon, Cleveland, Ohio, for the appellant.

Thomas S. Tyler, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed her indefinite suspension. For the reasons set forth below, we REVERSE the initial decision. The indefinite suspension is NOT SUSTAINED.

BACKGROUND

¶2 Effective December 18, 2010, the agency indefinitely suspended the appellant from her position as a GS-07 Fiscal Accounting Assistant with the agency's Defense Finance and Accounting Service (DFAS). Initial Appeal File (IAF), Tab 14, Exhibit D1. The appellant's position is designated as non-critical sensitive (NCS). *Id.*, Tab 5 at 128. The agency took the action because its

Washington Headquarters Service, Consolidated Adjudications Facility (CAF) had denied the appellant's eligibility to occupy a sensitive position based on her history of financial problems, *see* IAF, Tab 14, Exhibit E1, and the appellant's appeal of that decision was still pending before the Defense Office of Hearings and Appeals. *Id.*, Exhibit D4.

¶3 The appellant filed an appeal of her indefinite suspension and initially requested a hearing but later waived her right to a hearing. IAF, Tab 1 at 3, Tab 12. During the proceedings below, the administrative judge announced that he would apply the legal standard stated by the Board in *Conyers v. Department of Defense*, [115 M.S.P.R. 572](#), ¶ 34 (2010), in which the Board held that, in reviewing an indefinite suspension, it could consider the underlying merits of the agency's determination to deny an employee's eligibility to hold an NCS position and that the appeal would be adjudicated "under the generally applicable standards the Board applies in adverse action appeals." *See* IAF, Tab 11.

¶4 Based on the parties' written submissions, the administrative judge issued an initial decision that affirmed the appellant's indefinite suspension. IAF, Tab 15, Initial Decision (ID). The administrative judge found that the basis for the agency's action is supported by preponderant evidence, as there is significant documentary evidence showing that the appellant had a history of not meeting her financial obligations and that she did not satisfy her debts. *Id.* at 3. The administrative judge also found that there is a nexus between the appellant's conduct and the efficiency of the service, *id.* at 5, and that indefinite suspension is a reasonable penalty. *Id.* at 6.

¶5 The appellant filed a petition for review. Petition for Review File (PFR File), Tab 1. The Board issued an acknowledgment order in which it stated that the deadline for filing a response to the petition for review or a cross-petition for review was June 3, 2011. PFR File, Tab 2. Seven weeks after the deadline, the agency filed a response to the appellant's petition for review and a cross-petition for review, challenging the binding effect and/or validity of the Board's decisions

in *Conyers* and *Northover v. Department of Defense*, [115 M.S.P.R. 451](#) (2010). PFR File, Tab 3. The agency moved for the Board to accept its late petition. *Id.* at 5-6. More than three weeks after the appellant's deadline for responding to the agency's submission, the appellant filed a response.¹ PFR File, Tab 6.

ANALYSIS

The administrative judge properly determined that the appeal was governed by the *Conyers/Northover* standard.

¶6 Generally, in an adverse action appeal, the agency must prove its charge by a preponderance of the evidence, establish a nexus between the action and the efficiency of the service, and establish that the penalty it imposed is within the tolerable bounds of reasonableness. [5 U.S.C. §§ 7513](#)(a), 7701(c)(1)(B); *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306-07 (1981). More specifically, in appeals such as this, when the charge involves the agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority generally extends to a review of the merits of that withdrawal. *See Adams v. Department of the Army*, [105 M.S.P.R. 50](#), ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008).

¶7 In *Department of the Navy v. Egan*, [484 U.S. 518](#), 530-31 (1988), the Supreme Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a security clearance. There, the Court held that the Board does not have authority to review the substance of the

¹ We deny the agency's motion to accept its late-filed response to the appellant's petition for review and cross-petition for review. PFR File, Tab 3. The agency's presentation of good cause for its filing delay is limited, particularly given that the agency merely repeats arguments that it made below. Further, in light of the pending appeal before the Federal Circuit, it makes little sense for the Board to revisit *Conyers* and *Northover* at this juncture. Because we are rejecting the agency's cross-petition for review, we need not consider the appellant's belated response to the agency's cross-petition. *See* PFR File, Tab 6.

security clearance determination, as it would be required to do in other adverse action appeals. *Id.* Rather, the Court found that the Board has the authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in [5 U.S.C. § 7513](#), and whether transfer to a nonsensitive position was feasible. *Id.*; see *Hesse v. Department of State*, [217 F.3d 1372](#), 1376 (Fed. Cir. 2000).

¶8 The Board narrowly construed the *Egan* rule in two subsequent interlocutory appeals: *Conyers* and *Northover*. In *Conyers*, the Board held that the rule limiting the scope of Board review when an adverse action appeal is based on loss of a "security clearance" was not applicable to an indefinite suspension which was based on the denial of an employee's eligibility to occupy an NCS position which did not require that she have a security clearance or access to classified information. See *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 12-13. In *Northover*, the Board held that the rule limiting the scope of Board review when an adverse action appeal involves loss of a "security clearance" applies only when the agency has made a decision to deny, revoke, or suspend access or eligibility for access to classified information and was not applicable to a reduction in grade which was based on the denial of an employee's eligibility to occupy an NCS position. See *Northover*, [115 M.S.P.R. 451](#), ¶¶ 3, 13.

¶9 Here, the appellant's circumstances are very similar to those of the appellant in *Conyers*. See *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 2, 3, 13. The appellant holds an NCS position with DFAS, which requires that she maintain eligibility to hold a sensitive position. In addition, the appellant has represented, and the agency has not contested, that the appellant has never had access to classified information, see IAF, Tab 5 at 50, and nothing in her position description suggests that she ever had or needed a security clearance, see *id.* at 130-32.

Thus, we find that the administrative judge correctly determined that the Board has the authority to review the merits of the adverse action.²

The agency failed to show that it imposed the appellant's indefinite suspension for an authorized reason.

¶10 To sustain an indefinite suspension, the agency must show: (1) It imposed the suspension for an authorized reason, *see Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 13 (2010); (2) the suspension has an ascertainable end, i.e., a determinable condition subsequent that will bring the suspension to a conclusion, *e.g.*, *Drain v. Department of Justice*, [108 M.S.P.R. 562](#), ¶ 8 (2008); (3) the suspension bears a nexus to the efficiency of the service, *Harding v. Department of Veterans Affairs*, [115 M.S.P.R. 284](#), ¶ 21 (2010), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011); and (4) the penalty is reasonable, *id.*, ¶ 22.

¶11 With respect to what constitutes an authorized reason for indefinitely suspending an employee, the Board and its reviewing court have approved indefinite suspensions under three limited circumstances:

(1) when an agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed, pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process;

(2) when the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate, pending a determination that the employee is fit for duty; and

(3) when an employee's access to classified information has been suspended and the employee must have such access to perform his job, pending a final determination on the employee's access to classified information.

² Because *Conyers* was before the Board on interlocutory appeal, the Board did not reach the merits of the indefinite suspension. *See Conyers*, [115 M.S.P.R. 572](#).

Gonzalez, [114 M.S.P.R. 318](#), ¶ 13. Although it is not a finite list, the Board has yet to identify any further circumstances under which it would approve indefinitely suspending an employee. *See id.*

¶12 None of the three limited circumstances that allow for an indefinite suspension exists in this case. Moreover, we do not find that the facts of the case at bar present a basis for expanding the list. The agency did not suspend the appellant under the crime provision, because of a medical condition, or because her access to classified information had been suspended and she needed such access to perform her job.³ As the Board explained in *Conyers*, eligibility for access to classified information is not synonymous with eligibility to occupy a sensitive position. *See Conyers*, [115 M.S.P.R. 572](#), ¶ 17. Accordingly, the agency has failed to prove by preponderant evidence that it properly placed the appellant on an indefinite suspension. Therefore, we find that the indefinite suspension cannot be sustained.

ORDER

¶13 We ORDER the agency to cancel the suspension. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due,

³ As noted above, the appellant was not required to have access to classified information to perform her job. *See IAF*, Tab 5 at 50, 130-32.

and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶16 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.